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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 663.

JOHN A. SNYDER, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT APPEALS FOR THE THIRD CIRCUIT.

PETITION FOR REHEARING OR, IN THE ALTERNATIVE, TO MODIFY THE JUDGMENT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court:

John A. Snyder, the petitioner, by his counsel, respectfully shows to the Court as follows:

INTRODUCTORY.

1. This case and No. 582, *Helvering* v. *Rankin*, involve the same question. They were argued March 14th-15th, 1935, and decided April 29th, 1935. The question involved in each case is as to what evidence is required to identify shares of stock sold by a broker from a margin account, so as to overcome the prima facie presumption of fact established by Article 58 of Regulations 74 (Act of 1928), known as the rule of "first in first out."

2. In the *Rankin* case this Court has held that the communication to the broker of the taxpayer's intention to sell the last acquired shares first is sufficient. On this point the opinion reads:

> "*Third.* If the facts found by the Board of Tax Appeals had been what the Court of Appeals assumed them to be, there would have been such an identification of shares sold with shares purchased as to preclude the Commissioner from applying the "First in, first out" rule."

This Court, however, held that the facts so assumed may or may not have been supported by the record and, as counsel read the opinion, the case is to be remanded to the Board of Tax Appeals for further hearing and findings under *Helvering* v. *Taylor*, 293 U. S. 507, and authorities cited in Note 6.

3. In the instant case the judgment of the Court of Appeals was affirmed on the ground that the conceded fact of petitioner's intention was not sufficient identification in the absence of proof that this intention was communicated to the broker, and on the further ground that it was not found as a fact or proved that petitioner's extensive operations on the exchange constituted a trade or business.

WITH REGARD TO THE REQUESTED REHEARING BY THIS COURT.

4. It is respectfully submitted that in so ruling this Court may have overlooked the following facts alleged in the petition on the appeal to the Board of Tax Appeals and admitted:

> (Par. VIII, R. 6) From time to time during the year 1928 the petitioner instructed said firm* to *sell for his account certain shares of said stock.*
>
> (Par. XX, R. 14.) "Attached hereto as a part of this petition and marked Exhibits B and C are summary statements by months of all the transactions in U. G. I. stock herein referred to in the year 1928 in the two margin accounts * * * showing the number of shares bought and sold * * *."

These allegations are admitted (R. 22, pars. VIII and XX. They, therefore, do not require findings in their support. Moreover the Board of Tax Appeals stated in their opinion, embodying their findings (R. 23):

> "The facts upon which the case was submitted are those alleged in the amended petition and admitted in the respondent's answer thereto and those which it was stipulated the petitioner would testify to if present. For the purposes of this report the pertinent facts may be briefly summarized."

In other words the Board found all the admitted and undisputed facts and in their opinion merely summarized such of them as seemed to the Board pertinent.

On the question of sufficient identification the opinion of the Board reads (R. 25):

> "The applicability and validity of * * * the rule of 'first in first out' are the only questions presented for decision. The same petitioner was before us in a proceeding reported at 20 B. T. A. 778, contesting a

*The respective brokers, MacDonald & Co., par. VIII, R. 6; Clothier Jones & Co., par. VII, R. 5.

deficiency arising out of similar transactions in the same stock in the year 1925. In that case we sustained the * * * rule * * * and * * * our decision was affirmed * * * 54 Fed. (2d) 57. In the opinion of the Board it was said that there was no evidence of *'petitioner's intention to sell any designated stock.'* Evidently to meet this situation petitioner's testimony was given in this case to the effect that in each sale he intended to sell the most recently acquired stock. This, however, does not establish that the sales were made in that order and *we are unable so to find* in view of the stipulated facts that there *were no deliveries* of stock *certificates*, and the transactions were entirely through the medium of street certificates *which were not identified or in any way earmarked* for petitioner's account. Consequently the facts upon which we have to go here are in no way different (save as to amounts) from those in the previous case."

5. It is respectfully submitted that in holding that

> *"The only attempt at identification found by the Board* was the uncontradicted testimony of Snyder to the effect that 'in each case where a sale was made it was his intention to sell the last acquired stock first and shortly thereafter to buy back an equivalent amount in order to increase his margin and acquire additional shares of the stock,"

this Court has overlooked the above quoted excerpt from the opinion by which all the admitted and uncontested facts alleged and proved are adopted as the findings of fact.

6. This being so, it is submitted that in holding that the evidence of intention was insufficient identification, this Court may have overlooked the settled rule that where the party litigant, upon whom the burden of proof is cast by a *prima facie* presumption of fact (established by statute or regulation), offers evidence to the contrary, "the inference (of fact) is at an end." *Mobile etc. R. R.* v. *Turnipseed*, 219 U. S. 35 (petitioner's brief p. 25, reply brief p. 17, Wigmore on Evidence, reply brief, p. 18).

If the inference was at an end, then petitioner was entitled to the benefit of the inference of fact to be drawn from the alleged and admitted fact that he ordered the brokers "to sell certain shares" (*supra*, p. 3) and the undisputed and proved facts (R. 32, par. XIII), that

> "In each of such instances petitioner ordered said brokers to sell the various amounts of such stock mentioned in said Exhibits B and C * * *."
>
> "With respect to each of the items of sale of shares of stock specified in Exhibits B and C it was petitioner's intention to sell the last acquired stock first * * *."

From these established facts and from the nature of the transactions the inference of fact necessarily arises that when petitioner ordered the brokers to sell certain shares, he ordered them to sell the shares last acquired, thus bringing the instant case within the rule as to identification announced in the *Rankin* case (*supra* p. 2).

Upon this point attention is invited to the second paragraph of the portion of the opinion in the *Rankin* case designated *"Second"*, in which this Court, after rejecting the Government's contention that with respect to marginal transactions, the presumption is conclusive, says:

> "It is at most the burden of proof that is affected. For the margin trader, while being required to establish the identity of the shares in order to avoid the 'First in, first out' rule is *left free to introduce any relevant evidence.*"

It is submitted that this excerpt in substance is a reiteration of the principle stated in *Mobile etc. R. R.* v. *Turnipseed* and Wigmore on Evidence, *supra*, that when any relevant evidence is introduced the inference of fact is at an end. It can scarcely be contended that the intention of the petitioner and that his instructions to his brokers to sell certain shares at the dates and in the amounts set forth are not relevant evidence tending to establish identification.

Upon these grounds a rehearing is respectfully prayed.

WITH REGARD TO THE ALTERNATIVE RELIEF PRAYED FOR, OF A REHEARING BEFORE THE BOARD OF TAX APPEALS.

7. Petitioner, in view of the affirmance by this Court of the affirmance by the Court of Appeals of the decision of the Board, is in the position, because of "procedural entanglements*" of being unable, unless expressly authorized by this Court, to adduce available evidence to show that (a) petitioner communicated to the brokers his intention to sell the last acquired shares first (b) the brokers understood that petitioner was trading in and out on a rising market in order that he might eventually sell (as he did in the following year, 1929) a sufficient amount of the shares held on margin to pay off his debit balance and enable him to hold as a permanent investment the shares originally bought, (c) the transactions on the stock exchange were petitioner's only business transactions (except for a few weeks in January-February) in the tax year, and constituted a trade or business.

The facts which petitioner has available evidence to prove with respect to the year 1928 are as follows:

Petitioner began his trading operations in 1924 with an investment of $15,000.00 in cash. He had great confidence in the future value of shares of United Gas & Improvement Company and intended by trading on margin over a period of years on a rising market to realize a sufficient "paper profit" to enable him to acquire a large block of shares as a permanent investment. The operations in 1924 and 1925 were in moderate amounts and resulted in comparatively small profits. (*Snyder* v. *Commissioner*, 54 Fed. (2d) 57.) In 1926-1927 losses were sustained.** In 1928 petitioner was seventy-six years of age and had been in the employ of the Mechanics Insurance Company of Philadelphia for thirty-seven years, attaining the position of secretary at

*Atlantic Coast Line R. R. Co. v. Florida, No. 344, April 29, 1935.

**Net loss for 1926; $59,206.99 (Commr's statement R. 16-17).

a salary of $5,500.00. Because of ill health he took a vacation in February-March and on his return in April he attempted to resume his duties, had a heart attack, which incapacitated him from further work in the company, and thereafter for the rest of the year 1928 he gave no part of his time to the business of the company. The company, however, in recognition of his long service, has ever since kept him on in the honorary position of secretary and in 1928 and 1929 paid him the full salary of $5,500.00 a year. Petitioner paid clerks in the secretary's office an extra compensation for doing the work of the secretary.

From April on till the end of the year petitioner gave all of his time that he gave to any business matters, to his trading operations and, except for the summer months, kept in daily touch with his brokers and was in constant conferences with them as to his future operations. He made it clear to them that it was his intention to trade in and out, increase his holdings, to sell the shares last acquired, and eventually to hold the shares first bought as a permanent investment, in 1928 selling the shares from time to time, the purchase of which had impaired his account, as was the usual custom of the trade. To this end he kept in force with each of his brokers standing buying and selling orders so as to enable him on a rise to acquire additional shares and on a fall to sell enough of the last acquired shares to preserve his margin.

8. This evidence was not presented to the Board of Tax Appeals at the hearing, May 22d, 1933, for the following reasons:

(a) It would not have affected their ruling because of the decision of the Third Circuit of Appeals in the petitioner's 1925 case (*Snyder* v. *Commissioner*, 54 Fed. (2d) 57). Any review sought by the petitioner of an adverse decision of the Board must be had in that Court. In the opinion of the Court of Appeals in the 1925 case, affirming the ruling of the Board (20 B. T. A. 778) there is nothing to indicate that the communication to the brokers of petitioner's in-

tention would have been a sufficient identification to take the case out of the rule. On the contrary, the opinion of the Board of Tax Appeals in the 1925 case (as in the instant case (R. 25)), and the opinion of the Court of Appeals in the 1925 case all indicated that in order to take the case out of the rule the *certificates sold must be identified*. On this point the opinion of the Court of Appeals (54 Fed. (2d) 59) reads:

> "The broker thought, as he testified, he was selling the shares of the last purchases, though *in no way earmarked or allocated*. In other words, he *conceived* 'from the technique of Mr. Snyder's operations'—overloading the account—he was in each instance selling the shares latest purchased because it was those shares that, on a falling market, had embarrassed the account. Stated differently: But for the last purchases the account would not be embarrassed, therefore the broker sold *what he thought were the offending shares*, although a sale of shares purchased earlier would have restored the account just the same. * * * As *this was all the evidence of identification* in the case, it left the regulation, 'First in, first out,' in force and justified the determination of a deficiency tax."

Consequently it seemed necessary for petitioner, upon the hearing of the instant case before the Board, to adopt a theory which would distinguish the 1925 case, so that neither the rule of *stare decisis*, nor of *res adjudicata* might prevail.*

The instant case was argued before the Court of Appeals on the same day as the *Rankin* case. Both cases were elaborately briefed and argued. They were decided on the same day (73 F. 2, 5, 9).

True that that Court in the 1925 case had said that "something else" was needed beyond proof of petitioner's intention and of the knowledge, or assumption by the broker that the last acquired shares were the first sold

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*Before the Court of Appeals the Commissioner contended that the 1925 decision was *res adjudicata*. This contention was overruled (R. 35).

(R. 40). It was not until that Court rendered its decision in the *Rankin* case (73 F. 2d 9) that it was held by any court that *communication of the intention to the broker was sufficient identification.* Indeed it is submitted that the opinion of the Court of Appeals in the *Rankin* case on this point (now confirmed by the opinion of this Court in that case), is wholly inconsistent with the opinion of that Court in petitioner's 1925 case.

(b) At the time of the hearing before the Board in the instant case (May, 1933) petitioner was upwards of 81 years of age. At that time he was in a hospital, undergoing an operation and his doctors would not permit him either then or in the near future to undergo the strain of taking the stand or even of going into a detailed statement of all the facts. The best that counsel could do under the circumstances was to prepare a statement which petitioner approved, and have it introduced in lieu of evidence under a stipulation. The Government counsel were unwilling to stipulate further and counsel for petitioner was not informed until after the decision of the Court of Appeals in the instant case (September, 1933, by which time petitioner had recovered his health) as to the fact that from April to the end of the year 1928 petitioner's sole business activity was limited to his extensive trading operations. The schedules (R. 18-21) show that except for sales of 800 shares in February, petitioner's operations prior to May 1st were confined to purchases of 1000 shares in the Jones and 1100 shares in the MacDonald account. During the period from April 30th to December 31st he sold on various dates 3300 shares in the Jones account and 3800 shares in the MacDonald account, making with the 800 sold in February the total sales for the year 7900 shares as found (R. 24). During this same period April 30-December 31st he bought at various dates 3900 shares in the Jones account and 4600 in the MacDonald account making a total of purchases for the year of 10600* shares as found (R. 24).

*Including the 2100 shares bought prior to May 1st.

In view of petitioners great age and his serious illness with little prospect of immediate recovery, his counsel was put in the position of being forced to do as he did and it is submitted that in this very unusual situation petitioner is entitled to appeal to this Court to right a great wrong otherwise inevitable, namely a tax of $38,970.79 with over 36 per cent interest, in the aggregate over $52,000, instead of the tax of about $1,897.77* and interest in the aggregate about $2,600, a tax some twenty times as much as is justifiable.

In the opinion in the instant case, sections "*Second*" and "*Third,*" this Court has intimated that had it been found as a fact (or admitted) that petitioner in the tax year had been engaged in a "trade or business" within Section 22(a) of the Revenue Act of 1928, petitioner's contention that the transactions for that year should have been segregated and the tax computed accordingly, without reference to purchases in prior years, would have been sustained.

As appears from the above statement there is now available newly discovered evidence, which was not known to counsel until after the decision of the Court of Appeals, proving clearly under the cases cited on the point by this Court and under *Walter Thiele,* 32 B. T. A. 134, that, except for a few weeks in the early part of the year, as petitioner gave all his time to these transactions they constituted a trade or business. This evidence was not known to counsel and could not be ascertained at the time because of petitioner's illness and great age.

It is submitted that under the peculiar circumstances herein set forth the interests of justice authorize the granting of the relief prayed.

As the Board of Tax Appeals was misled quite as much as petitioner by the decision of the Third Circuit Court of Appeals in the Snyder case for 1925 (54 F. 2d 57) and as it is not a court, the same strictness is not required with

*Petitioner's brief Appendix B. p. 300).

respect to granting new trials as in the courts of first instance.

Petitioner's counsel in the instant case was not retained until shortly before the hearing before the Board. The above evidence has become known to counsel, part after the decision of the Court of Appeals and part since the decision of this Court. It is newly discovered evidence and it is clearly sufficient to support petitioner's contentions. The names of the witnesses, in addition to petitioner are Raymond H. Bailey, a member of C. Clothier Jones & Co., and Robert MacDonald, Jr., a member of MacDonald & Co.

It is further submitted that the instant case is within the spirit of the decision of this Court in *Helvering* v. *Taylor*, 293 U. S. 507 and "consonant with the great remedial purposes of the legislation creating the Board of Tax Appeals." (*Ib.* 516)

WHEREFORE, it is respectfully prayed that a rehearing be granted, or, in the alternative; that the judgment of this Court direct the Board of Tax Appeals to grant a rehearing, at which the petitioner may prove the facts above referred to, so as to identify the shares sold, under the ruling in No. 582, *Rankin*, and to prove that the transactions referred to constituted petitioner's business throughout the tax year.

JOHN A. SNYDER, *Petitioner*,
by HENRY M. WARD, *Counsel*.

District of Columbia, ss:

Henry M. Ward, being first duly sworn, deposes and says that he is counsel for the petitioner above named; that he has read the above petition; and that the same is true to the best of his knowledge.

HENRY M. WARD.

Subscribed and sworn to before me this 17th day of May, 1935.

MINERVA CLINTON,
Notary Public.

(Notarial Seal)

CERTIFICATE OF COUNSEL.

I, Henry M. Ward, Counsel for the petitioner above named, hereby certify that the above petition is in my opinion well founded, is presented in good faith and not for delay.

May 17, 1935,

HENRY M. WARD.